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No. 96-662

In The

Supreme Court of the United States

October Term, 1996

THE BANK OF NEW YORK, as Collateral Trustee, NEW JERSEY NATIONAL BANK, HARRIS TRUST AND SAVINGS BANK, and BOATMEN'S FIRST NATIONAL BANK OF OKLAHOMA, as First, Second and Third Series Trustees, respectively,

Petitioners,

vs.

CONTINENTAL AIRLINES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether under the facts and circumstances of this case the courts below properly applied the doctrine of "equitable mootness," which has been uniformly adopted by all federal circuit courts that have considered the question, in dismissing Petitioners' appeals of a bankruptcy court order confirming a Chapter 11 plan of reorganization and incorporating prior interlocutory orders denying Petitioners' claims, where: (a) Petitioners knew that the plan of reorganization would be implemented promptly unless they obtained a stay of the confirmation order; (b) Petitioners also knew that if the plan were implemented, their appeals might be subject to dismissal under the equitable mootness doctrine; (c) Petitioners nonetheless failed diligently to seek a stay and refused to post any bond to support a stay; and (d) the relief sought by Petitioners would retroactively alter the fundamental economic basis of the confirmed plan and, therefore, be inequitable to investors and numerous other third parties who had relied on the unstayed confirmation order in substantially consummating the plan of reorganization?

PARTIES TO THE PROCEEDING BELOW

Respondent incorporates by reference Petitioners' list of parties to the proceeding below.

RULE 29.6 LIST

Continental Airlines, Inc. has no parent company. Its only non-wholly owned subsidiary is Air Micronesia, Inc.

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Respondent Continental Airlines, Inc. respectfully opposes the Petition for Writ of Certiorari. The decision of the United States Court of Appeals for the Third Circuit upholding the dismissal of Petitioners' bankruptcy appeals under the well-accepted doctrine of equitable mootness — the legitimacy of which Petitioners never challenged below — is consistent with the law in every circuit court of appeals that has addressed the issue and presents no issue of exceptional importance warranting review by this Court.

OPINIONS BELOW

Respondent incorporates by reference Petitioners' statement of opinions and judgments below.

STATEMENT OF JURISDICTION

Respondent incorporates by reference Petitioners' statement of jurisdiction.

STATEMENT OF THE CASE

A. Background:Continental's Chapter 11 Bankruptcy And Reorganization

This case involves a narrow dispute relating to one of the largest successful Chapter 11 bankruptcy reorganizations in history. For approximately two years after filing Chapter 11 bankruptcy petitions on December 3, 1990, Continental Airlines, Inc. and 53 of its subsidiaries (hereafter collectively referred to, along with the subsequently established reorganized entity, as "Continental") negotiated intensively with creditors and prospective third-party investors to develop a viable plan of reorganization. (Appendix ("App.") to Petition for Certiorari ("Pet.") 3a, 5a).

Those negotiations ultimately bore fruit: on January 13, 1993, Continental filed its Revised Second Amended Joint Plan of Reorganization (the "Plan"), which provided for the consensual restructuring of more than $6 billion in asserted secured debt and lease obligations and for the resolution of approximately $3 billion in unsecured claims. (JA 614-814). The Plan was based on an Investment Agreement by outside investors (Air Partners, L.P. and Air Canada) to invest $450 million in the reorganized company (the "Investment") if certain financial and other conditions were satisfied, including limitations on the reorganized company's liability for administrative claims arising out of the bankruptcy case. (App. 5a, JA 391-414). The Investment Agreement was expressly described in the Revised Third Amended Disclosure Statement and appended to it. (App. 5a, JA 391, 636, 713, 718, 822).

An overwhelming majority of Continental's thousands of creditors supported the Plan. (JA 1546). Over 85% of the voting holders of unsecured claims and 96 of the 100 classes of secured creditors voted to accept the Plan.

On April 16, 1993, the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") confirmed the Plan after a nine-day evidentiary hearing. (JA 1532-1613). The Confirmation Order was based, among other things, on the Bankruptcy Court's determination that the Plan was "feasible," as required by section 1129(a)(11) of the Bankruptcy Code. (App. 135a, 137a-139a, JA 1548-53 ¶¶ 31, 35-37, 40). The feasibility determination rested on the Bankruptcy Court's careful consideration of numerous facts and factors set forth in the Confirmation Order. In particular, the court found that because the total administrative claims against the reorganized company would not exceed the Investment Agreement cap on such claims, the Investors would invest the $450 million that was essential to the Plan. (App. 19a-20a, 137a-138a).

Petitioners[1], who were among the few groups of creditors that did not support the Plan, appealed the Confirmation Order and other interlocutory Bankruptcy Court orders incorporated therein to the District Court (collectively, the "Appeals"). (App. 6a). However, Petitioners failed to obtain a stay of the Confirmation Order, primarily because they refused to offer to post any *supersedeas* bond in support of a stay.[2] (App. 6a, 16a, 66a, *infra,* p. 9).

On April 27, 1993, in reliance upon the unstayed Confirmation Order, the Plan was consummated with the $450 million Investment and related transactions accomplished in a consolidated closing. (App. 6a-7a, 25a-26a; *infra,* p. 10). Continental successfully reorganized and emerged from bankruptcy as the sixth largest air carrier in the United States. (JA 1454).

B. Nature Of Petitioners' Claims At Issue

Petitioners' Appeals relate to only a portion of a $180 million alleged secured claim Petitioners filed in Continental's bankruptcy. Under the Bankruptcy Code, alleged secured claims such as Petitioners' have two separate components. The claim is deemed secured up to the actual value of the collateral. 11 U.S.C. § 506(a) (1995). To the extent the amount of the claim exceeds the value of the collateral, or is "undersecured," the amount in excess of the value of the collateral (the "deficiency") is treated as an unsecured claim. *Id. (See also* App. 61a).

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1. As used herein, "Petitioners" refers to Petitioners' predecessors-in-interest as trustees for holders of certain debt certificates issued by Continental and secured by aircraft and aircraft engines (the "Collateral").

2. Petitioners' disingenuous statement that they could not post a bond of $450 million (Pet. at 7) ignores the District Court's invitation to propose a lesser amount and Petitioners' refusal thereafter to offer to post any bond. *See infra,* p. 9.

Pursuant to the Plan, the secured component of Petitioners' claim with respect to the Collateral was treated identically to those of other secured claimants: Continental returned the Collateral to Petitioners. (App. 46a). In addition, prior to confirmation, Petitioners and Continental reached a cash settlement concerning that portion of the undersecured component of Petitioners' claim which was based on alleged "use" decline in the value of the Collateral due to use and wear and tear. (App. 5a-6a, JA 1511).

The underlying dispute here relates solely to Petitioners' contention that the Bankruptcy Court erred in refusing to treat the portion of Petitioners' unsecured claim relating to an alleged decline in the market value of the Collateral as an administrative priority claim — that is, a claim to be paid by the reorganized company in cash, superior to those of other unsecured creditors. (App. 5a-6a, 61a). Over Petitioners' objection, this portion of their claim was treated as a general unsecured claim and not given any special priority status. (App. 46a).

C. The Bankruptcy Court's Determinations That Petitioners' Claims Lacked Merit

On June 28, 1991, Petitioners jointly moved for "adequate protection" of their interest in the Collateral ("Initial Motion"). (App. 4a; JA 47-48).[3] In that motion, Petitioners requested payment from the debtors-in-possession to compensate Petitioners for alleged declines in the value of the Collateral. However, Petitioners did not seek to lift the automatic stay so they could repossess the Collateral. (App. 190a, JA 47-59). Continental opposed the motions on the ground, among others,

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3. Petitioners' reference to the filing of an earlier motion by one of Petitioners' predecessors-in-interest (*see* Pet. at 3) ignores the subsequent withdrawal of that motion (*see* App. 4a).

that Petitioners' recovery was barred by their failure to move to lift the automatic stay — that is, to seek return of the Collateral and to assume the risk of market value decline. (App. 4a, 190a).

After a four-day hearing, the Bankruptcy Court denied the Initial Motion on August 27, 1992. *In re Continental Airlines, Inc.*, 146 B.R. 536 (Bankr. D. Del. 1992) (App. 187a-198a). Weighing the evidence presented at the hearing, including the testimony of three experts, the Bankruptcy Court held that Petitioners were not entitled to recover because the value of the Collateral in fact had not declined since the filing of the motion. (App. 4a, 197a).

Not until August 14, 1992, did Petitioners move under Bankruptcy Code § 362(d) to lift the automatic stay so that they might repossess the Collateral. (JA 213-35). It had been 21 months since the petition date, and months since Continental opposed the Initial Motion on the grounds that Petitioners had failed to seek to lift the automatic stay. A month later, on September 14, 1992, Petitioners renewed their motion for "adequate protection" pursuant to Section 363(e), seeking payment for alleged declines in the Collateral's value from July 1991 forward. (JA 243-53). The Bankruptcy Court conducted hearings on the motions on several days in late 1992, concluding the hearings on February 2, 1993.

Once again, evidence adduced at the hearings showed that the Collateral had not declined in market value since August 14, 1992, but — to the contrary — actually had increased in value. (JA 292-94; 445; 464-65; 482-83; 942-43; 1133-35; 1146, Row D-E, Columns 17-20; 1146, Columns 6, 12, 15 and 16; 1169). The evidence indicated that any decline in value had occurred between September 1991 and early August 1992. (*Id.*).

On January 13, 1993, Continental filed its Second Amended Plan of Reorganization, based on the Investment Agreement. *See supra,* p. 2. As noted previously, the $450 million Investment that was the linchpin of the Plan was subject to several conditions precedent. (JA 391-414). A central condition was that Continental's administrative expenses, which would be liabilities of the reorganized entity, would not exceed a specified amount. (*See* Investment Agreement § 6(xi)(e), JA 408; *supra,* p. 2).

Although Petitioners' pending motions were fully briefed and argued as of March 16, 1993 — the first day of Plan confirmation hearings — the Bankruptcy Court had not yet decided the motions. (App. 18a). However, resolution of the motions was critical to determining whether the proposed Plan would be feasible. Allowance of Petitioners' asserted $117 million administrative priority claim would result in administrative claims greatly in excess of the Investment Agreement cap. Under the Bankruptcy Code, administrative expense claims would be immediately due and payable by the reorganized entity. 11 U.S.C. § 1129(a)(9)(A). Post-reorganization payment of such claims would substantially deplete the cash available to the reorganized airline, which would be operating in a volatile industry where cash reserves are critical. If, therefore, Petitioners' motions were granted, the Investors would decline to invest the $450 million, and the Plan would be infeasible and therefore unconfirmable under 11 U.S.C. § 1129(a)(11). (App. 19a-20a, JA 1205, 1432, 1550, 1744-46).

Recognizing that resolution of Petitioners' pending motions was necessary before the prospective obligations of the reorganized entity, and the feasibility and confirmability of the Plan, could be assessed, Continental and the Investors asked

the court to rule on Petitioners' motions in conjunction with Plan confirmation. (JA 1455, 1458, 1473). At the conclusion of the confirmation hearing on April 16, 1993, the Bankruptcy Court denied both motions. It held that Petitioners were not entitled to market decline "adequate protection" payments for periods prior to their motion to take back their Collateral, and that the evidence established that the value of the Collateral had not declined after that date. *In re Continental Airlines, Inc.*, 154 B.R. 176, 180-82 (Bankr. D. Del. 1993) (App. 183a) .

In its Confirmation Order determining that the Plan was feasible, the Bankruptcy Court necessarily relied upon its decision denying Petitioners' motions. (App. 137a, 138a, JA 1551-52). The Bankruptcy Court recognized that its determination that Petitioners had no administrative claim resolved any uncertainty concerning satisfaction of the Investment Agreement condition limiting administrative claims and therefore removed an obstacle to the Investment which was essential to the Plan's feasibility.[4] (App. 19a, 135a, 138a, JA 1548-51 ¶¶ 31, 35). The Bankruptcy Court incorporated these findings into the Confirmation Order because they were integral to the required feasibility determination. The unsecured portion of Petitioners' claim thus was denied special status and received the same treatment as all other unsecured claims.

D. Petitioners' Failure Diligently To Seek A Stay Of The Confirmation Order

Petitioners undertook limited, procedurally flawed, and ultimately futile efforts to obtain a stay pending appeal of the Confirmation Order. Most significantly, they refused to offer to

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4. Resolution of Petitioners' administrative claim also made it unnecessary to require the Debtors to deposit funds in a segregated account as Petitioners had requested. (App. 138a).

post a bond in any amount. (App. 107a). They made this choice despite the District Court's requests that Petitioners suggest a reasonable bond and despite their knowledge that failure to obtain a stay risked dismissal of their Appeals. (App. 16a, 24a, 59a).

The automatic stay of the Confirmation Order pursuant to Fed. R. Bankr. P. 7062 expired on April 27, 1993, ten days after entry of the Confirmation Order. Fed. R. Bankr. P. 9006(a). Yet, Petitioners waited six days after entry to request a stay of the Confirmation Order. (JA 1614-20). Moreover, when Petitioners finally did request a stay, late on April 22, 1993, they improperly moved in the District Court, in contravention of Fed. R. Bankr. P. 8005, which requires that such a stay motion first be presented to the Bankruptcy Court. For that reason, on April 23, 1993, the District Court dismissed the stay motion without prejudice. (JA 1668-1711, 1757-63). The District Court concluded that dismissal was

> particularly warranted under the facts of the instant case, where the "emergency" nature of [Petitioners'] motion was created in large measure by [Petitioners]. [Petitioners] could have brought an application for a stay pending appeal in the Bankruptcy Court as early as Monday, April 19, 1993.

(JA 1762).

Petitioners inexplicably waited three more days, until late in the afternoon of April 26, 1993, before seeking a stay from the Bankruptcy Court. Bankruptcy Court Docket Entry #7115. Because the Bankruptcy Court was unavailable, the District Court heard the stay application on April 27, 1993. (JA 1712-54).

The District Court again denied the stay motion (JA 1755-56), primarily because Petitioners were unwilling to offer to post a bond *in any amount.* (JA 1725, 1729, 1756; *see also* App. 16a, 66a). Contrary to Petitioners' suggestion (*see* Pet. at 7), the District Court *never* required a bond in the amount of $450 million. (App. 16a). Instead, it sought Petitioners' views as to what amount would be reasonable. (*Id.*). As the District Court subsequently recognized, Petitioners' failure to obtain a stay was attributable to their own "choice not to post a bond" of any sort. (App. 107a).

In refusing to post any bond in the District Court and, thereafter, failing to pursue any further efforts to seek a stay in the Court of Appeals, Petitioners were well aware that they risked dismissal of their Appeals. They knew that, absent a stay, the confirmed Plan would be implemented promptly and their appeals from the Confirmation Order would be at risk of dismissal pursuant to the well-established equitable mootness doctrine. At both stay hearings, Continental expressly stated its intention to consummate the Plan promptly on April 27, 1993, if no stay were in effect. (JA 1692-93, 1742). Moreover, both at the confirmation hearing and at the stay hearing, *Petitioners' own counsel* explicitly recognized that, absent a stay, Continental would seek to dismiss the Appeals as equitably moot. (JA 1403, 1752; *see also* App. 24a, 59a). Nonetheless, they declined to take the action required to ensure that the Appeals would be resolved prior to consummation of the Plan.[5]

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5. This case thus stands in stark contrast to the handling of appeals in another airline bankruptcy. In *Pension Benefit Guaranty Corp. v. Braniff Airways, Inc.*, 700 F.2d 935, 938-39 (5th Cir. 1983), appellants arranged an expedited appeal process in which appeals of a February 1, 1983, bankruptcy court order to the district court and the Fifth Circuit were completed by March 2, 1983, prior to the scheduled deadline for consummation of the transaction at issue.

E. Substantial Consummation Of The Plan

Relying on the unstayed Confirmation Order, the Investors invested $450 million in Continental.[6] The Investment was made as part of a single integrated closing, which included the following material transactions (among others): the merger of 54 Continental-related debtors into a new entity; the investment of $110 million in cash by Air Partners and Air Canada into the reorganized Continental; an additional $30 million investment by Air Canada into the reorganized Continental; the purchase by ASATT Corp., a designee of Air Canada, of $150 million of secured notes issued by reorganized Continental; reorganized Continental's assumption of more than 600 unexpired leases and executory contracts worth over $5.0 billion; the abandonment of Continental's interest in equipment collateral; and the issuance of new debt and distributions of cash and stock to various categories of creditors pursuant to the Plan. (App. 26a, JA 691, 708, 719, 1812-1815). As a result of these

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6. Contrary to Petitioners' insinuation, there was nothing sinister about Continental's prompt consummation of the Plan, which is the norm in large bankruptcy cases. *See, e.g., Miami Center Ltd. Partnership v. Bank of New York*, 820 F.2d 376, 378 (11th Cir. 1987), *cert. denied*, 488 U.S. 823 (1988); *Braniff Airways*, 700 F.2d at 939 (expediting appeals in airline bankruptcy case "[b]ecause business exigencies required that the [ ] transaction be consummated soon if it was to happen at all"); J. Key, *The Advent of the Serial Chapter 11 Filing and its Implications*, 8 Bankr. Dev. J. 245, 253 (1991) ("the majority of plans are substantially consummated . . . immediately after confirmation"). In this case, prompt implementation of the Plan was essential to avoid a risk that one or more of the transactions would become impossible due to changed circumstances. *Cf. Braniff Airways, supra.* The Investment Agreement expressly provided that the Investment was conditioned on consummation of the Plan by April 30, 1993. (JA 411).

transactions, the Plan was substantially consummated.[7]

F. Dismissal Of Petitioners' Appeals

On May 6, 1993, Continental moved to dismiss Petitioners' Appeals as equitably moot. (JA 1771-75). In opposing the motion, Petitioners did not challenge the validity of the equitable mootness doctrine, but merely disputed that it required dismissal of their Appeals. (App. 11a, 28a, JA 1965-1977). The District Court granted the motion. (JA 1870-75). Petitioners sought reconsideration, relying on *Frito-Lay, Inc. v. LTV Steel Co., Inc. (In re Chateaugay Corp.)*, 10 F.3d 944 (2nd Cir. 1993) (*"Chateaugay II"*), a recent appellate decision applying the equitable mootness doctrine, to argue again that the doctrine did not require dismissal of the Appeals. (JA 1876-99). The District Court denied the motion. (App. 101a-103a).

G. The Third Circuit's Affirmance Of The District Court's Dismissal Of The Appeals

On appeal, a divided panel of the Third Circuit Court of Appeals affirmed. (App. 75a-100a). After rehearing *in banc*, a majority of the Court of Appeals similarly concluded that the District Court properly applied the doctrine of equitable mootness in dismissing the Appeals. (App. la-38a, 74a).

1. The *In Banc* Majority Opinion

The majority opinion, written by Chief Judge Sloviter,

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7. The Bankruptcy Code defines "substantial consummation" as "(A) transfer of all or substantially all of the property proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan." 11 U.S.C. § 1101(2).

recognized that the dispositive issue was not Article III mootness but, rather, the District Court's application of the "widely recognized" and "well-accepted" doctrine of equitable mootness in bankruptcy appeals to the particular facts of this case. (App. 8a-9a). Under this doctrine, " '[a]n appeal should . . . be dismissed as moot when, even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable.' " (App. 10a, *quoting Official Comm. of Unsecured Creditors of LTV Aerospace & Defense Co. v. Official Comm. of Unsecured Creditors of LTV Steel Co. (In re Chateaugay Corp.)*, 988 F.2d 322, 325 (2d Cir. 1993) *("Chateaugay I")*. The majority cited opinions from seven other circuit courts of appeal (for the First, Fourth, Fifth, Seventh, Ninth, Eleventh, and D.C. Circuits) which had recognized and applied the doctrine. (App. 9a). It also noted — and on this point the dissent agreed — that Petitioners "have not challenged the viability of the doctrine of equitable mootness . . . in bankruptcy cases, nor have they cited to a case in any circuit that rejects the concept." (App. 11a, 28a).

The majority identified five factors that courts have addressed in determining whether a bankruptcy appeal should be dismissed as equitably moot. These included:

> (1) whether the reorganization plan has been substantially consummated, (2) whether a stay has been obtained, (3) whether the relief requested would affect the rights of parties not before the court, (4) whether the relief requested would affect the success of the plan, and (5) the public policy of affording finality to bankruptcy judgments.

(App. 13a). The majority again noted — and the dissent did not dispute — that Petitioners "[had] not taken issue with our identification of these factors." (App. 13a, 30a).

Applying these factors, the majority concluded that, on the facts of this case, the balance of equitable factors weighed heavily in favor of dismissal. The substantial consummation of the plan of reorganization; Petitioners' failure diligently to seek and obtain a stay — particularly in light of their knowledge of the risk of equitable mootness; and the strong public interest in the finality of bankruptcy judgments all favored dismissal. (App. 14a-16a, 24a). The majority also concluded that relief could not be equitably granted to Petitioners without unfairly harming rights of third parties. Reversing the Bankruptcy Court Orders to allow Petitioners' proposed administrative claim would radically alter the fundamental economic basis of the Plan. That would be unfair to the Investors, who had made the $450 million investment that was the linchpin of the Plan in reliance on the unstayed Confirmation Order and "extensive legal precedent" recognizing the equitable mootness doctrine, and to other absent third-parties who similarly had relied on the confirmed Plan in entering into numerous complex transactions involving the reorganized Continental. (App. 20a-22a, 24a).

In this regard, the majority rejected as misplaced Petitioners' reliance on the Plan provision authorizing Continental to pay disputed administrative claims allowed after confirmation. The mere existence of a mechanism that could be used for payment of claims which, unlike Petitioners' claims, had not been decided prior to confirmation, did not eliminate the fundamental problem that "in light of all the circumstances, it would be inequitable to grant relief." (App. 24a). Because Petitioners well knew the risk of equitable mootness, "the Plan provisions allowing for post-confirmation payment of allowed claims in no way obviated [Petitioners'] obligation to seek a stay." (*Id.*).

The majority also rejected, as supported by "no evidence," Petitioners' suggestion that the Bankruptcy Court was improperly influenced in its determination denying Petitioners'

suggestion that the Bankruptcy Court was improperly influenced in its determination denying Petitioners' claim. (App. 19a). Petitioners' argument in this regard essentially amounted to a challenge to the Investment Agreement provision conditioning the investment on compliance with a "cap" on administrative expenses. But, the majority noted, Petitioners never had raised such a challenge in the Bankruptcy Court, nor had they identified any legal basis for such a challenge. (App. 19a). The majority similarly concluded that the incorporation in the Confirmation Order of the Bankruptcy Court's denials of Petitioners' claims "was reasonable and reflected the inescapable fact that [Petitioners'] claim and the confirmation of Plan were inextricably intertwined."[8] (App. 20a)

For all these reasons, the majority concluded that "[u]nder the circumstances presented here, we can see no prudential considerations" that would justify an attempt to fashion even a limited remedy for Petitioners. (App. 7a, 26a).

2. The *In Banc* Dissent

Judge Alito, the author of the panel dissent, also wrote the dissent *in banc*. (App. 27a). He recognized that

> [Petitioners] have not contested the existence of the doctrine of "equitable mootness," and in light of [Petitioners'] position, I think that

8. The majority's conclusion is consistent with precedent recognizing the appropriateness of incorporating into a confirmation order prior findings or orders that are relevant to the determinations required for confirmation. *See, e.g., In re Farm Bureau Services, Inc.*, 835 F.2d 877 (6th Cir. 1987); *In re Meyer*, 173 B.R. 419, 421 (Bankr. D. Kan. 1994) (stipulation and order for adequate protection incorporated into confirmation order); *In re Clark*, 172 B.R. 701, 704 (Bankr. S.D. Ga. 1994) ("confirmation order necessarily incorporates any orders that may be entered by the court in connection with the allowance of claims.").

> it is appropriate to assume the existence of this doctrine for purposes of this appeal.

(App. 28a).

The dissent did not demonstrate any inconsistency between the majority's "equitable mootness" analysis and those of other circuits. (App. 29a-30a). Instead, the dissent contended that the majority erred in failing to "ma[k]e an independent examination of the basis and scope of the doctrine of 'equitable mootness' before engraving it in our circuit's law." (App. 30a). That is, the dissent contended that the majority had erred by not departing from the law in its sister circuits. (*See* App. 32a-33a).

The dissent then reviewed the development of the law of equitable mootness and developed its own proposed approach. Under that approach — for which the dissent cited no authority — the Appeals should be considered on the merits, and equitable concerns relating to Petitioners' failure to obtain a stay, the finality of plans of reorganization, and protection of third parties, rights should be addressed only "at the remedial stage, if that stage is ever reached." (App. 37a).

REASONS FOR DENYING THE WRIT

None of the "compelling reasons" that this Court has required for certiorari is present in this case. S. Ct. Rule 10. To the contrary, this is simply another instance in which a litigant who lost when well-established law was applied to complex facts seeks to overturn that decision by belatedly conjuring up legal theories and policy arguments in the hopes of obtaining certiorari.

In applying the "equitable mootness" doctrine long recognized in eight other federal circuits, the Third Circuit

maintained the uniformity of federal law in this area. The strained argument at the end of the Petition that minor syntactic differences in the courts' references to one of the several equitable factors that courts balance constitute a narrow circuit split is meritless. *See infra,* pp. 19-21.

Petitioners' unquestioning acceptance of the equitable mootness doctrine in the courts below bars — and belies — their broad challenges in this Court to its legitimacy. *See infra,* § II. Nothing in the flexible, pragmatic equitable mootness doctrine — or the Third Circuit's decision applying it in this case — prevents effective appellate review of bankruptcy court decisions or undermines established law requiring compliance with confirmed plans of reorganization. *Cf.* Pet. at 13. The dismissal of Petitioners' appeals in this case was attributable to their choice not to post a bond and obtain a stay of the Confirmation Order that would have protected the interests of all parties. That Petitioners may now regret the entirely foreseeable consequences of that tactical decision in no way undermines the soundness of the decision below.

I.

THE "EQUITABLE MOOTNESS" DOCTRINE APPLIED BY THE THIRD CIRCUIT IS CONSISTENT WITH THE LAW IN EVERY CIRCUIT THAT HAS ADDRESSED THE ISSUE.

A. Nine Circuit Courts Of Appeals Have Adopted The "Equitable Mootness" Doctrine In Bankruptcy Appeals As An Essential Means Of Furthering Important Bankruptcy Policies.

Petitioners cannot — and do not — dispute that, as the *in banc* majority recognized and the dissent did not dispute, every

circuit that has considered the issue has held that federal courts may appropriately rely on equitable and prudential considerations to dismiss bankruptcy appeals that are not constitutionally moot but which are pending after substantial consummation of a confirmed plan of reorganization.[9] As these courts have recognized, the "equitable mootness" doctrine derives from "concerns unique to bankruptcy proceedings." *Manges*, 29 F.3d at 1038. *See also UNR*, 20 F.3d at 769-71. Under the doctrine, "a reviewing court may decline to consider the merits of a confirmation order when there has been substantial consummation of the plan such that effective judicial relief is no longer available" without imposing inequitable adverse consequences upon "third parties who are not before the reviewing court but who have acted in reliance upon the plan as implemented." *Manges*, 29 F.3d at 1039. Courts have declined requests for relief which would be "effective" for the appellant but inequitable to other parties. *See, e.g., UNR*, 20 F.3d at 769-71; *Chateaugay I*, 988 F.2d at 325; *Central States*, 841 F.2d at 96. The equitable component of the mootness doctrine in bankruptcy proceedings thus reflects "a recognition by the appellate courts that there is a point beyond which they

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9. *See* App. 9a; *Manges v. Seattle-First Nat'l Bank (In re Manges)*, 29 F.3d 1034, 1038-39 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1105 (1995); *In re UNR Indus., Inc.*, 20 F.3d 766, 769-71 (7th Cir.) (accepting substantive doctrine but rejecting phrase "equitable mootness"), *cert. denied*, 115 S. Ct. 509 (1994); *Chateaugay II*, 10 F.3d 944, 952-53 (2d Cir. 1993); *In re Specialty Equip. Cos.*, 3 F.3d 1043, 1048 (7th Cir. 1993); *Chateaugay I*, 988 F.2d 322, 325 (2d Cir. 1993); *Rochman v. Northeast Utils. Serv. Group (In re Public Serv. Co. of N.H.)*, 963 F.2d 469, 471-72 (1st Cir.), *cert. denied*, 506 U.S. 908 (1992); *First Union Real Estate Equity & Mortgage Invs. v. Club Assocs. (In re Club Assocs.)*, 956 F.2d 1065, 1069-70 (11th Cir. 1992); *In re Andreuccetti*, 975 F.2d 413, 418 (7th Cir. 1992); *Central States Southeast and Southwest Areas Pension Fund v. Central Transp., Inc.*, 841 F.2d 92, 95-96 (4th Cir. 1988); *In re AOV Indus., Inc.*, 792 F.2d 1140, 1147 (D.C. Cir. 1986), *vacated on other grounds*, 797 F.2d 1004 (D.C. Cir. 1986); *Trone v. Roberts Farms, Inc. (In re Roberts Farms, Inc.)*, 652 F.2d 793, 796-97 (9th Cir. 1981).

cannot order fundamental changes in reorganization actions." *Manges*, 29 F.3d at 1039. *See also UNR*, 20 F.3d at 769-71.

The courts' reliance on the mootness doctrine to avoid disturbing successfully completed reorganizations is rooted in "the important policy favoring finality in bankruptcy proceedings." *In re Public Serv. Co.*, 963 F.2d at 474. *See also In re Onouli-Kona Land Co.*, 846 F.2d 1170, 1172 (9th Cir. 1988); *In re Information Dialogues, Inc.*, 662 F.2d 475, 477 (8th Cir. 1981). The finality achieved by rigorous application of the equitable mootness doctrine protects not only the interests of the debtor and third parties in particular bankruptcy proceedings, but, even more importantly, the strong public interest in successful bankruptcy reorganizations. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984). The importance of finality to successful reorganizations is demonstrated by sections 363(m) and 364(m) of the Bankruptcy Code. Those sections provide comfort to third party lenders and asset purchasers which is essential to maximize the value of estate assets. *See United States v. Salerno*, 932 F.2d 117, 123 (2d Cir. 1991); *In re Stadium Management Corp.*, 895 F.2d 845, 847 (lst Cir. 1990).

As the Seventh Circuit recognized in *UNR*, the principle embodied in Bankruptcy Code § 363 similarly requires that transactions which are integral to confirmed and substantially consummated plans of reorganization should not be upset on appeal. *See UNR*, 20 F.3d at 769. Judge Easterbrook explained that this rule is essential to attracting the new capital needed for successful reorganizations.

> [I]t is the reliance interests engendered by the plan, coupled with the difficulty of reversing the critical transactions, that counsels against attempts to unwind things

> on appeal. Every incremental risk of revision on appeal puts a cloud over the plan of reorganization, and derivatively over the assets of the reorganized firm. People pay less for assets that may be snatched back or otherwise affected by subsequent events. Self-protection through the adjustment of prices may affect the viability of the reorganization .... By protecting the interests of persons who acquire assets in reliance on a plan of reorganization, a court increases the price the estate can realize ex ante, and thus produces benefits for creditors in the aggregate.

UNR, 20 F.3d at 770.

B. There Is No Conflict Among The Circuits As To The Legal Standard To Be Applied In Determining Whether A Bankruptcy Appeal Is Equitably Moot.

Petitioners rely on semantic differences in snippets of language cropped from some appellate decisions to argue at the end of their Petition that there is a narrow conflict in the circuits as to the standard for evaluating mootness. *See* Pet. at 20. They assert that some circuits permit equitable mootness dismissals of bankruptcy appeals only where "effective relief" is not available, which Petitioners argue is a narrower standard than that articulated in other cases upholding dismissal where it is not "'equitable' to grant relief." *Id.*

Petitioners' distinction — and the purported conflict — is illusory. The decisions cited by Petitioners make clear that in those cases — as in this one — the court's determination whether it would be possible to grant "effective relief" included an

assessment of whether such relief would be equitable to third parties who, like the Investors, relied on an unstayed confirmation order. For example, in *In re Club Assocs., supra,* the Eleventh Circuit affirmed an equitable mootness dismissal, expressly recognizing that the mootness analysis required inquiry into the question "[w]hat effect would granting relief have on the interests of third parties not before the court?" — in that case, third-party investors who had committed new funds to the reorganized entity in substantial reliance on an unstayed confirmation order. 956 F.2d at 1069 n.11, 1070. Similarly, in *In re AOV Indus., Inc.,* the D.C. Circuit emphasized "the limits of our determination" that certain appealed claims were not equitably moot — which included the fact that, unlike in this case, "[all] of the parties that could be affected by these claims were before this court." 792 F.2d at 1149. And in *Central States,* the Fourth Circuit dismissed an appeal as equitably moot where even the narrower relief proposed would have "impose[d] substantial adverse consequences upon . . . absent persons" whose support of the confirmed plan was "at least partially based upon" economic terms that would have been changed by the proposed relief. 841 F.2d at 95, 96.

Nor do the *Chateaugay* cases upon which Petitioners rely so heavily support their proposed distinction. In the most recent such decision, *Aetna Casualty & Surety Co. v. LTV Steel Co. (In re Chateaugay Corp.) ("Chateaugay III")*, 94 F.3d 772 (2d Cir. 1996), the Second Circuit affirmed that portion of a district court decision "applying the factors we enumerated in [*Chateaugay II*]" to determine that appeals of bankruptcy court orders approving a settlement were not equitably moot. *Id.* at 776. The affirmed district court decision expressly stated the rule previously established in the Second Circuit's prior *Chateaugay* decisions as providing that

> An appeal should also be dismissed as moot

> when, even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable.

Aetna Casualty & Surety Co. v. LTV Steel Co. (In re Chateaugay Corp.), 1995 WL 386483 at *3 (S.D.N.Y. June 28, 1995), *rev'd and remanded on other grounds*, 94 F.3d 772 (2d Cir. 1996). *See also Chateaugay I*, 988 F.2d at 325 (same); *Chateaugay II*, 10 F.3d at 952-53 (to avoid mootness, appellant must show satisfaction of all elements of a multi-factor test, including that "appellant pursued with diligence all available remedies to obtain a stay . . . if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from.").

Indeed, the Petition itself refutes the suggestion that this Court needs to resolve a purported narrow circuit conflict. The language of the Petition discloses Petitioners' recognition that the term "effective relief" incorporates an analysis of whether relief would be equitable — that is, effective for all concerned. *See* Pet. at i, Question Presented No. 2 (suggesting that test for equitable mootness should be whether "effective relief can be fashioned in favor of the creditor that would not imperil the debtor's reorganization *or upset any reasonable reliance interest* "). (Emphasis added). *See also id.* at 21 (characterizing holding in *Chateaugay II* as having rejected LTV's [mootness] argument because effective relief could be fashioned without imperiling the reorganization *or upsetting any reasonable reliance interest*). (Emphasis added).

II.

PETITIONERS HAVE WAIVED ANY CHALLENGE TO THE LEGITIMACY OF THE WELL-ESTABLISHED "EQUITABLE MOOTNESS" DOCTRINE.

Petitioners raise an argument never previously presented in this case: that a federal court's dismissal of a bankruptcy appeal as equitably moot is improper because the court lacks authority to decline to exercise statutorily authorized jurisdiction. (Pet. at 13-15; *compare* App. 28a). In the courts below, Petitioners never challenged the legitimacy of the equitable mootness doctrine *per se;* to the contrary, they expressly relied on equitable mootness cases to argue that their Appeals were not moot. *See supra,* p. 11. Because the issue Petitioners now seek to raise was not briefed in or passed on by the Third Circuit in affirming the dismissal of Petitioners' Appeals, this Court should apply its traditional rule and decline to grant certiorari to address this issue. *See Holly Farms Corp. v. NLRB,* 116 S. Ct. 1396, 1402 n. 7 (1996); *United States v. Williams,* 112 S. Ct. 1735, 1738 (1992).

Even if Petitioners' waiver did not bar their challenge to the validity *per se* of the "equitable mootness" doctrine, the argument does not merit review. The rigid rule Petitioners now belatedly propose would require the Court to overrule uniform precedent established during the past 15 years in nine federal circuits. Moreover, the cases cited by Petitioners in support of their belatedly asserted theory arose, as Petitioners themselves acknowledge, "in another context" of abstention and related doctrines of federalism. (Pet. at 15, *citing Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976); *Quackenbush v. Allstate Insurance Co.,* 116 S. Ct. 1712 (1996)). Those doctrines are not implicated in bankruptcy appeals, which are exclusively federal proceedings in which the rules and

principles of equity play a central role. *Pepper v. Litton*, 308 U.S. 295, 304 (1939).

III.

THIS CASE DOES NOT PRESENT ANY BROAD ISSUES OF FEDERAL BANKRUPTCY LAW OR POLICY THAT REQUIRE RESOLUTION BY THIS COURT.

Petitioners' remaining arguments for review involve precisely the sorts of disputes about a lower court's application of established law to complex facts that this Court routinely refuses to review. *See* Supreme Court Rule 10. Equitable mootness determinations such as the one at issue here are necessarily based "upon close consideration of the relief sought in light of the facts of the particular case." *Central States*, 841 F.2d at 96. *(See also* App. 20a, 25a-26a).

For that reason, there is no merit to Petitioners' melodramatic suggestions that the decision below will introduce uncertainty into the Chapter 11 reorganization process by giving investors' interests "unreviewable weight" in determining creditors, rights, undermining existing law requiring compliance with confirmed plans of reorganization, or permitting bankruptcy courts to insulate their decisions from judicial review. *See* Pet. at 16-17. Bankruptcy courts and parties to future reorganization proceedings will understand that the Bankruptcy Court decision denying Petitioners' claims turned on the specific requests for relief set forth in Petitioners' motions and the Bankruptcy Court's factual findings concerning those claims based on evidentiary hearings and expert testimony.[10] They will

10. As Continental explained in its briefs in the courts below, the Bankruptcy Court's decision was correct not only as a matter of fact but also as a matter of law and policy. To hold that Petitioners could recover for alleged market value decline that occurred prior to their request to take back the Collateral would effectively make other unsecured creditors insurers of market risk to creditors who refused themselves to assume any of that risk.

further understand that the equitable mootness determination dismissing Petitioners' Appeals of the Bankruptcy Court orders turned upon the specific terms of a complex plan of reorganization and the Investment Agreement upon which the Plan was based, Petitioners' refusal to post any bond in support of a stay pending appeal, and third parties' substantial irrevocable changes of position in reliance upon the unstayed Confirmation Order. To the extent the rulings below have any broader meaning, it is only to reaffirm the already well-established proposition that appellants from bankruptcy confirmation orders who fail diligently to seek a stay of such orders risk dismissal of their appeals as equitably moot if the plan of reorganization is substantially consummated, depending upon all the facts and circumstances.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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